88-1895

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR AUDUBON FEDERAL SAVINGS & LOAN ASSOCIATION,

Plaintiff

VERSUS

MARK C. SMITH, III, ET AL.,

Defendants

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit erred in affirming the judgment of the United States District Court for the Eastern District of Louisiana denying Petitioners' Motion for Summary Judgment and remanding the case to the District Court for a determination of the intent of Petitioners in executing the continuing guarantee sued on in the proceedings below.

Whether under Louisiana law a continuing guarantee which covers "advances made under line of credit" can pertain to a one time lump sum mortgage loan.

Whether Petitioners are entitled to summary judgment in that there is no genuine issue as to a material fact and

Petitioners are entitled to judgment as a matter of law.

LISTING OF ALL THE PARTIES

Undersigned counsel for Petitioners provides the following list of parties as required by Supreme Court Rule 21.1(b):

1. Mark C. Smith, III
2. Toulouse Consulting Co., Inc.
3. Century General Corporation
4. Prince Conti, Inc.
5. Assets Holding Corporation
6. Marie Antoinette Investors
7. Federal Savings and Loan Insurance Corporation

RUSSELL M. GARDNER
Counsel for Defendants,
Mark C. Smith, III, Toulouse Consulting Co., Inc., Century General Corporation, Prince Conti, Inc., Assets Holding Corporation, Marie Antoinette Investors

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR AUDUBON FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiffs

VERSUS

MARK C. SMITH, III, ET AL.

Defendants

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

This Petition for Certiorari arises out of the granting by the United States District Court for the Eastern District

of Louisiana of a Motion for Summary Judgment in favor of respondents Federal Savings and Loan Insurance Corporation, ("FSLIC") as receiver for Audubon Federal Savings and Loan Association ("Audubon") under Rule 56 of the Federal Rules of Civil Procedure, against Petitioners on a continuing guarantee allegedly on a loan indebtedness to Audubon. The District Court had jurisdiction of this case under 12 U.S.C. Section 1730 (K)(1)(B). Petitioners had simultaneously brought a cross-motion for summary judgment which was denied by the District Court. The judgment as to both motions was entered on August 5, 1987 and was a final appealable judgment on the merits within the meaning of Rule 54 of the Federal Rules of Civil Procedure.

The decision of the District Court was

affirmed in part, reversed in part, the judgment vacated and the case remanded by the United States Court of Appeals for the Fifth Circuit on January 18, 1989. On February 1, 1989 a Petition for Rehearing was filed as to the failure of the Court of Appeals to reverse the judgment of the District Court as to Petitioners' cross-motion for summary judgment and to enter summary judgment in favor of Petitioners. That petition was denied on February 16, 1989.

The Supreme Court of the United States may properly exercise its power of supervision as the Court of Appeals' ruling herein is in conflict with well settled Louisiana law.

Rule 17.1(a) of the Supreme Court Rules and 28 U.S.C. Section 2101 confer on this Honorable Court jurisdiction to

review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

On July 22, 1983, Royal Bienville Investors (RBI), a Louisiana partnership, borrowed $500,000 from Audubon Federal Savings & Loan Association. The promissory note evidencing the loan was secured by a mortgage on a parking garage in New Orleans. In addition, Petitioners[1] simultaneously executed a continuing guarantee agreement in favor

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[1]. The relationship of the Petitioners is as follows: Toulouse Consulting Co., Inc., Century General Corporation, Prince Conti, Inc., and Assets Holding Corporation are general partners of Marie Antoinette Investors. Marie Antoinette Investors is the general partner of Royal Bienville Investors, the principal debtor of both promissory notes discussed in this case. Mark C. Smith, III is the president of Toulouse Consulting Co., Inc., Century General Corporation, and Prince Conti, Inc.

of Audubon, assuring the repayment of "any indebtedness, direct or contingent, of [RBI] to Audubon **for advances made under line of credit.**" On September 23, 1983, RBI borrowed $4,000,000 from Audubon, securing the loan with a mortgage on certain hotel property in New Orleans.

In March of 1984 Petitioners formed another partnership, Royal St. Charles, Ltd. (RSC) and transferred to it the two promissory notes and the properties securing the notes. In return, RBI became a 74% limited partner of RSC.

On July 10, 1985, RSC filed a petition under Chapter 11 of the bankruptcy code. FSLIC, as receiver for Audubon, participated in the reorganization and voted for the approval of a plan which modified the payment

terms of the two notes. Thereafter, the FSLIC filed the instant suit in District Court, seeking to enforce the continuing guaranty agreement.

FSLIC moved for summary judgment contending that under the guaranty agreement Petitioners were liable for the unpaid portions of the two debts. Petitioners countered that the guaranty agreement was applicable only to loans made "under line of credit" and that no line of credit had been established for RBI. They further maintained that the FSLIC's participation in the bankruptcy proceedings and approval of the reorganization plan constituted a novation of the debt, thus releasing the guarantors. After a hearing on the cross-motions for summary judgment, the District Court granted judgment to the

FSLIC in the amount of $4,490,678.76. An appeal to the United States Court of Appeals for the Fifth Circuit followed.

On January 17, 1989, the Court of Appeals affirmed the judgment of the District Court in part, and reversed and vacated the summary judgment entered in favor of FSLIC by the District Court.

The case was remanded by the Court of Appeals to the District Court for "determination of the intent of the parties [regarding the mortgage loan and continuing guarantee] or, if no specific intent existed, the trade usage, if any, of the phrase 'line of credit,' and resolution of this dispute consistent with that determination." On February 1, 1989 Petitioners filed for rehearing with the Court of Appeals. Petitioners did not seek rehearing as to the reversal and

vacation of the judgment of the District Court. However Petitioners did seek a rehearing by the Court of Appeals on the failure of the Court of Appeals to enter judgment in favor of the Petitioners on their cross-motion for summary judgment. Petitioners contended in the District Court and in the Court of Appeals that the continuing guaranty could not be read to cover the mortgage indebtedness in question and as a result there was not genuine issue as to any material fact and Petitioners were entitled to judgment as a matter of law under Rule 56 of the Federal Rules of Civil Procedure. The Court of Appeals denied the request for rehearing on February 16, 1989.

ARGUMENT

Louisiana Civil Code article 2046 states:

> When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent.

La. Civ. Code Ann. art. 2046 (West 1986) (emphasis added).

This constructional maxim for interpretation of contracts under Louisiana law bars the consideration of extrinsic evidence as to the contracting parties' intent where the terms of the contract are clear and unambiguous. See Sabine Constr. Inc. v. Cameron Sewerage Dist. No. 1, 298 So.2d 319, 325 (La. Ct. App. 3d Cir. 1974):

> contracts must be interpreted to achieve the intent and result intended by the parties thereto. When such intent is clear and express in the agreement itself, the terms of the contract prevail.

(Emphasis added).

The record in this case indisputably

shows that the loan made in question was a commercial mortgage loan, it was not a "line of credit" under any circumstance. There is a clear, concise, and well-established usage of the term "line of credit" within the meaning of commercial banking laws. This meaning has been described as follows:

> A common form of loan occurs where a bank commits itself to extend short-term credit to a commercial borrower up to a specified sum of money. Lines of credit usually are extended against 90-day or demand promissory notes and are subject to the understanding that the compensation arrangements and general relation between bank and borrower will remain satisfactory to both. In effect, a line of credit is an expression of intention only and may be cancelled or remanded by the bank at any time. Most banks, however, view a line of credit, once extended, as a commitment, even though not a legal one, and thus make every effort to honor it, even when loanable funds are relatively scarce.

J. Kusnet, J. Antopol, Modern Banking Forms (with commentary), (3d Ed. 1983), at 1-8.

As can be seen from the above definition, a line of credit does not have anything to do with a mortgage loan upon which a lump sum payment is made, but rather is the very antithesis of a mortgage loan. As can also be seen from this definition, the meaning of the term "line of credit" is not ambiguous.

The terms of the continuing guarantee then are clear and unambiguous, and therefore, according to Louisiana law, no further examination is permitted in search of the parties' intent. Also, the continuing guarantee only refers to "advances" made under line of credit. The debts in issue were not "advances"

but rather single transaction mortgage loans with lump sum payments. It is clear that the mortgage loans in question cannot fall within any meaning of "advances under line of credit."

Given these facts, the search for the parties' intent cannot extend further than the four corners of the agreement. See J.M. Brown Constr. Co. v. D&M Mechanical Constr., Inc., 222 So.2d 93, 98 (La. Ct. App. 1st Cir. 1969):

> The rule of strict construction does not authorize perversion of language or the creation of ambiguity where none exists. **Neither does it authorize the courts to make a new contract where the language employed clearly expresses the intent of the contracting parties.**

(Emphasis added). Accord, Cambre v. Travelers Indemnity Co., 404 So.2d 511, 513 (La. Ct. App. 4th Cir. 1981).

Because the language employed in

this contract clearly expresses the intent of the parties, and the meaning of "line of credit" cannot comprehend the mortgage loans in question, it is improper for the District Court to look any further than to the contract itself. Therefore a remand of the proceedings to the District Court to determine the parties' intent, or in the absence of intent the trade usage of "line of credit," is inappropriate and summary judgment must be rendered in favor of the Petitioners.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals affirming the judgment of the District Court denying Petitioners' Motion for Summary Judgment and remanding the case to the District Court must be reversed

and judgment entered in favor of the Petitioners on their Motion for Summary Judgment.

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Counsel for Petitioners, Mark C. Smith, III, Toulouse Consulting Co., Inc., Century General Corporation, Marie Antoinette Investors

CERTIFICATE OF SERVICE

I, Russell M. Gardner, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Original Petition for Writ of Certiorari of Petitioners to all counsel of record this 17th day of May, 1989.

_____

Russell M. Gardner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-3546

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR AUDUBON FEDERAL SAVINGS & LOAN ASSOCIATION,

Plaintiffs-Appellee,

V.

MARK C. SMITH, III, ET AL,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(CA-87-052-"I."-(1))

(January 18, 1989)

Before POLITZ, GARWOOD, and SMITH, Circuit Judges.

Before POLITZ, GARWOOD, and SMITH, Circuit Judges.

POLITZ, Circuit Judge:[1]

Enforcing a continuing guaranty agreement, the district court granted summary judgment in favor of Federal Savings and Loan Insurance Corporation against Mark C. Smith, III, Toulouse Consulting Co., Inc., Century General Corporation, Prince Conti, Inc., Assets Holding Corporation, and Marie Antoinette Investors. For the reasons assigned, we affirm in part, reverse in part, and

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[1]. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

remand.

Background

On July 22, 1983, Royal Bienville Investors (RBI), a Louisiana partnership, borrowed $500,000 from Audubon Federal Savings & Loan Association. The promissory note evidencing the loan was secured by a mortgage on a parking garage in New Orleans. In addition, appellants[2] simultaneously executed a continuing guarantee agreement in favor of Audubon,

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[2]. The relationship of the appellants is as follows: Toulouse Consulting Co., Inc., Century General Corporation, Prince Conti, Inc., and Assets Holding Corporation are general partners of Marie Antoinette Investors. Marie Antoinette Investors is the general partner of Royal Bienville Investors, the principal debtor of both promissory notes discussed in this case. Mark C. Smith, III is the president of Toulouse Consulting Co., Inc., Century General Corporation, and Prince Conti, Inc.

assuring the repayment of "any indebtedness, direct or contingent, of [RBI] to Audubon for advances made under line of credit." On September 23, 1983, RBI borrowed $4,000,000 from Audubon, securing the loan with a mortgage on certain hotel property in New Orleans.

In March of 1984 appellants formed another partnership, Royal St. Charles, Ltd. (RSC) and transferred to it the two promissory notes and the properties securing the notes. In return, RBI became a 74% limited partner of RSC.

On July 10, 1985, RSC filed a petition under Chapter 11 of the bankruptcy code. FSLIC, as receiver for Audubon, participated in the reorganization and voted for the approval of a plan which modified the payment

terms of the two notes. Thereafter, the FSLIC filed the instant suit, seeking to enforce the continuing guaranty agreement.

The FSLIC moved for summary judgment contending that under the guaranty agreement appellants were liable for the unpaid portions of the two debts. Appellants countered that the guaranty agreement was applicable only to loans made "under line of credit" and that no line of credit had been established for RBI. They further maintained that the FSLIC's participation in the bankruptcy proceedings and approval of the reorganization plan constituted a novation of the debt, thus releasing the guarantors. After a hearing on the cross-motions for summary judgment, the

district court granted judgment to the FSLIC in the amount of $4,490,678.76. This appeal followed.

Analysis

One seeking summary judgment must establish the absence of any genuine issue of material fact and the entitlement to judgment as a matter of law. Fed.R.Civ.P. 56(c); **Galindo v. Precision American Corp.**, 754 F.2d 1212 (5th Cir. 1985); **Trevino v. Celanese Corp.**, 701 F.2d 397 (5th Cir. 1983). The trial court is to draw all reasonable inferences in favor of the party opposing the motion. In reviewing an order of summary judgment, we apply the same standards as the trial court. **Harrison v. Byrd**, 765 F.2d 501 (5th Cir. 1985). If contradictory, reasonable inferences

may be drawn from undisputed facts, summary judgment is improper. **Fischbach & Moore, Inc. v. Cajun Elec. Power Co-op., Inc.**, 799 F.2d 194 (5th Cir. 1986); **Winters v. Highland Ins. Co.**, 569 F.2d 297 (5th Cir. 1978).

The continuing agreement guaranteed "any indebtedness, direct or contingent, of [RBI] to Audubon for advances made under line of credit to [RBI] on or after July 22, 1983, whether due or to become due, now existing or hereafter arising." (Emphasis added.) The guarantors insist that the agreement contemplated that their guaranty would apply only to debts arising under a line of credit to be established and that no line of credit was ever agreed upon. One Texas appellate court, considering the

term in a trade setting, noted: "In the mercantile world, the expression 'line of credit' has a well defined meaning. It signifies a margin of credit by one to another to the extent agreed upon." **Pittinger v. Southwestern Paper Co. of Fort Worth**, 151 S.W.2d 922, 925 (Tex. Ct. App. 1941). The meaning to be given to the phrase in the context of banking, however, may not be that non-opaque.

From the contested record, the district court concluded that according to "the wording of the continuing guaranty itself . . . the parties intended this guaranty to cover the two notes of RBI at issue in this case." Based on the summary judgment record before us, we cannot agree with that conclusion.

The record does not contain a sufficient basis for a definitive ruling, as a matter of law, on the meaning to be ascribed to the words "line of credit" as used in the continuing guaranty. The intent of the parties is critical to a proper understanding of their contract and to the resolution of their contractual dispute. In the case at bar, the intent of the parties is contradicted and presents a genuine issue of material fact.

As we observed in **Fischbach & Moore**, "[s]ummary judgment is not appropriate 'when a contract is ambiguous and the parties' intent presents a genuine issue of material fact." 799 F.2d at 197 (citations omitted). See also **NRM Corporation v. Hercules, Inc.**, 758 F.2d

676, 682 (D.C. Cir. 1985) ("[W]hen the parties' intent is 'wholly unambiguous' on the face of the agreement, disposition on a motion for summary judgment may be appropriate . . . When, however, the language is unclear and the search for intent extends beyond the four corners of the agreement, the intended meaning of the contract is a disputed and, necessarily, material question of fact and summary judgment is improper."). Accordingly, we reverse and vacate the summary judgment on this issue and remand the case to the district court for determination of the intent of the parties or, if no specific intent existed, the trade usage, if any, of the phrase "line of credit," and resolution of this dispute consistent with that

determination.

Appellants further contend that even if they are liable under the guaranty agreement, the FSLIC's participation in the bankruptcy proceeding and acceptance of the reorganization plan, which restructured payment of the two promissory notes, resulted in a novation under Louisiana Civil Code article 1882 automatically releasing them from further liability. We are not persuaded.

Under the terms of the continuing guaranty, Audubon was entitled to "make changes of any sort whatever in the terms of its contract or manner of doing business with [RBI] and with other parties and securities in relation thereto." Therefore, assuming that the guaranty covered the two promissory

notes, the district court correctly concluded that the continuing guaranty permitted restructuring of payments without affecting the viability of the continuing guaranty and without constituting a novation. We affirm the grant of summary judgment on that issue.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

87-3546

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR AUDUBON FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff-Appellee,

versus

MARK C. SMITH, III, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(FEBRUARY 16, 1989)

Before POLITZ, GARWOOD and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge